

NO. 48612-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

PAVEL FEDOROVICH ZALOSH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01105-2

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID #91127

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR	1
I. Sufficient evidence was presented to support Zallozh's convictions for Residential Burglary and Theft of a Firearm. ..	1
II. There was sufficient evidence to support Zallozh's conviction for Possession of Stolen Property in the Second Degree.	1
III. This Court should not review Zallozh's claim of erroneous admission of evidence as Zallozh failed to preserve the alleged error for appeal.	1
STATEMENT OF THE CASE	1
ARGUMENT	11
I. Sufficient evidence was presented to support Zallozh's convictions.....	11
II. There was sufficient evidence to support Zallozh's conviction for Possession of Stolen Property in the Second Degree.	17
III. This Court should not review Zallozh's claim of erroneous admission of evidence as Zallozh failed to preserve the alleged error for appeal.	20
CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>State v. Carothers</i> , 84 Wn.2d 256, 525 P.2d 731 (1974).....	13
<i>State v. Everybodytalksabout</i> , 145 Wn.2d 456, 39 P.3d 294 (2002)	22
<i>State v. Ferguson</i> , 100 Wn.2d 131, 667 P.2d 68 (1983).....	21
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985)	21
<i>State v. Hermann</i> , 138 Wn.App. 596, 158 P.3d 96 (2007)	18
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	20
<i>State v. Kleist</i> , 126 Wn.2d 432, 435, 895 P.2d 398 (1995).....	17
<i>State v. Koepke</i> , 47 Wn.App. 897, 738 P.2d 295 (1987)	21
<i>State v. Korum</i> , 157 Wn.2d 614, 141 P.3d 13 (2006)	21
<i>State v. Kroll</i> , 87 Wn.2d 829, 558 P.2d 173 (1976).....	12
<i>State v. Kronich</i> , 160 Wn.2d 893, 161 P.3d 982 (2007)	20
<i>State v. Longshore</i> , 141 Wn.2d 414, 5 P.3d 1256 (2000)	17
<i>State v. Lubers</i> , 81 Wn.App. 614, 915 P.2d 1157 (1996)	12
<i>State v. Luna</i> , 71 Wn.App. 755, 862 P.2d 620 (1993).....	13
<i>State v. McPhee</i> , 156 Wn.App. 44, 230 P.3d 284, <i>rev. denied</i> , 169 Wn.2d 1028 (2010).....	18, 20
<i>State v. Melrose</i> , 2 Wn.App. 824, 470 P.2d 552 (1970)	18, 20
<i>State v. Pacheco</i> , 70 Wn.App. 27, 851 P.2d 734 (1993), <i>rev'd on other</i> <i>grounds</i> , 125 Wn.2d 150, 882 P.2d 183 (1994).....	12
<i>State v. Powell</i> , 166 Wn.2d 73, 206 P.3d 321 (2009)	20, 21, 22
<i>State v. Rodriguez</i> , 78 Wn.App. 769, 898 P.2d 871 (1995)	13
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	12
<i>State v. Tasker</i> , 193 Wn.App. 575, 373 P.3d 310 (2016)	15, 16
<i>State v. Teal</i> , 152 Wn.2d 333, 96 P.3d 974 (2004)	13
<i>State v. Thompson</i> , 88 Wn.2d 13, 558 P.2d 202 (1977)	12
<i>State v. Zamora</i> , 63 Wn.App. 220, 817 P.2d 880 (1991).....	12

Statutes

RCW 9A.08.020.....	13
RCW 9A.52.025(1).....	12
RCW 9A.56.010(21).....	17
RCW 9A.56.160.....	17
RCW 9A.56.300(1).....	12

Rules

ER 403	21
ER 404(b).....	20, 21
RAP 2.5(a)(3).....	20

RESPONSE TO ASSIGNMENTS OF ERROR

- I. Sufficient evidence was presented to support Zallozh's convictions for Residential Burglary and Theft of a Firearm.**
- II. There was sufficient evidence to support Zallozh's conviction for Possession of Stolen Property in the Second Degree.**
- III. This Court should not review Zallozh's claim of erroneous admission of evidence as Zallozh failed to preserve the alleged error for appeal.**

STATEMENT OF THE CASE

Pavel Zallozh (hereafter 'Zallozh') was charged by Fifth Amended Information with Residential Burglary, two counts of Theft of a Firearm, and one count of Theft in the First degree by value in excess of \$5,000; these counts involving a burglary at John Mowery's home in June 2012, and two counts of possession of stolen property in the second degree by value in excess of \$750, involving property belonging to Kyong Cha and Scott Powell and Liviu and Silvia Lucaci, and one count of Bail Jumping. CP 65-66. The case proceeded to trial in Clark County Superior Court starting on December 7, 2015. At trial the State called 14 witnesses.

The testimony and evidence at trial showed that John Mowery's home located at 7700 NE 67th Street in the City Vancouver, Clark County,

Washington was burglarized in June 2012. RP 109-13. Mr. Mowery testified that on June 2, 2012, at about 10a.m., he, his wife, and their child, left their home in their car to go look at yard sales and maybe get some lunch. RP 111. As they backed their car out of the driveway, Mr. and Mrs. Mowery saw two men standing on the corner watching them; Mrs. Mowery thought it didn't feel right and wanted to go back home. RP 111. Mr. Mowery remembers the two men were young, approximately 17 to 25 years of age, one was tall and skinny, and the other was short and heavier. RP 111. Mr. Mowery and his family were gone from their house for about an hour to an hour and a half. RP 112. Upon returning, they noticed the back sliding glass door was open. RP 113. At first, Mrs. Mowery thought Mr. Mowery had left the door open, but then they looked inside the house and saw the place had been "ransacked." RP 113. Everything was pulled out of the dressers and drawers in every room. RP 113. Mr. Mowery described it as appearing as if a hurricane had come through their house. RP 113. Many things were missing from their house. RP 115. Mr. Mowery made a detailed list of all the missing items to give to police and their insurance agent. RP 115. The missing items included a DR Nikkon digital camera valued at \$149.99, a Toshiba laptop valued at \$489.96, a Sony PSP game system valued at \$129.99, a PS3 game system valued at \$328.99, wireless controller for the game system and the game, valued at \$59.99

and \$19.99 respectively. RP 117. Also missing were two firearms and the safes they were stored in. RP 117-18. The firearms were a Sig Sauer p229r-dak .40 caliber handgun valued at \$1,099, and a Torse .38 caliber special ultralight valued at \$461. The gun safes were valued at \$159.99 and \$169.99. Also missing was \$450 in cash, a knife valued at \$99.95, a flashlight valued at \$115, and a lot of jewelry, including a tungsten ring valued at \$175, a gold ring valued at \$500, diamond earrings valued at \$144.50, diamond and gold pendant valued at \$395, a gold and gemstone item valued at \$400, a pearl and gold ring valued at \$250, a 24 carat gold ring and bands valued at \$1,200, a gold Buddha emblem valued at \$650, a gold necklace valued at \$1,300, a timex watch valued at \$70, and a gold pocket watch valued at \$400. RP 117-18. The total amount of property stolen from Mr. Mowery's home, leaving out the firearms, was approximately \$8,000 or \$9,000.

Mr. Mowery had lived in the neighborhood for about six years at the time of the burglary, and testified that it was uncommon to see many pedestrians on the sidewalks or streets in this area. RP 112. He indicated,

It's a real quiet community. Mostly you see your neighbors out walking their dogs and stuff like that. But it's not heavy foot traffic through there. It's not like, on a main strip or street, so it's very rare you would see anyone that isn't your neighbor standing around out there.

RP 112. Mr. Mowery did not believe the two young men he saw standing on the corner near his house on June 2, 2012 lived in the neighborhood; he did not recognize them, and he knows his neighbors well, and did not know these two. RP 112.

Mr. Mowery testified to a familiarity with guns, and indicated that the two firearms that had been stolen were a Sig Sauer p229r-dak .40 caliber handgun and a Torse .38 special ultralight. RP 117, 22. Both firearms were functioning; Mr. Mowery shoots both of the guns regularly, maintains them and knows they worked and were currently loaded. RP 122-23.

Along with all the other items previously listed, Mr. Mowery's black backpack was stolen during the burglary. RP 123. Mr. Mowery identified the backpack depicted in Exhibits 2 and 8 as his backpack, and it had an identifying information card in the backpack which was visible in the photograph. RP 123-27.

On June 2, 2012, Emma Kagramanova was at her friend Mariam Chuklanov's house, in her garage, getting ready for a garage sale. RP 82-83. Ms. Chuklanov lives at 7802 NE 67th Street in Vancouver, Washington. RP 95. It was about 10 or 11 in the morning, and the weather was gloomy: not raining, but cloudy. RP 84. As they were in the garage, Ms. Kagramanova and Ms. Chuklanov saw two young men walk by on the

sidewalk, down towards the end of the cul-de-sac, and then they saw them return walking back the other way, on the sidewalk directly in front of Ms. Chuklanov's house. RP 85-86, 97-98. Ms. Kagramonova saw them carrying a backpack and "speed walk[ing]." RP 86. Ms. Kagramonova recognized one of these men as Zalozh and identified him in the courtroom during trial. RP 86-87. Ms. Kagramonova knows of Zalozh through friends and family members and her church and has seen his picture on social media before. RP 88. Ms. Chuklanov also goes to the same church and knows Zalozh's brother, Andre. RP 101. Ms. Chuklanov did not know Zalozh, but had maybe seen him once. RP 104. As the two men walked by her house, she thought that one of them looked like Andre's brother. RP 100-01.

Ms. Chuklanov has lived in her neighborhood for 15 years and testified that no one in the Zalozh family lives in her neighborhood. RP 105.

Michael Norton lived at 7611 NE 67th Street in Vancouver, Washington on June 2, 2012. RP 133-34. At that time, Mr. Norton lived across the street from Mr. Mowery. RP 135. Mr. Norton has a home surveillance system on his house with four cameras mounted to the outside of his house. RP 135. Three cameras are set up at the front of the home, capturing the front yard, driveway, sidewalk and some of the street. RP

136. Ex. 34 was admitted and it showed video surveillance from Mr. Norton's cameras on June 2, 2012. RP 138-39. The exhibit showed a video recorded at 10:39 a.m., on June 2, 2012, which depicts two people walking towards the Mowerys' home. RP 140. The exhibit also showed a video recorded at 11:03 a.m., on June 2, 2012, that depicts two people running away from the Mowerys' home. RP 140.

Liviu Lucaci and his wife lived in Vancouver, Washington in June 2012. RP 141-42. On June 10, 2012 their home was burglarized and various items were stolen, including jewelry, electronics, some coins from Mr. Lucaci's collection, and other small things. RP 142-43. Mr. Lucaci and his wife called police who came and investigated. RP 142. A few days later, a police officer returned some recovered jewelry and coins to the Lucacis. RP 144. Mr. Lucaci's collection included 50 to 80 one dollar coins, and an Alaskan mint coin he paid \$60 for. RP 147-48. Mr. Lucaci identified Exhibit 10 as a photograph showing their jewelry. RP 145. Mrs. Lucaci also testified and she estimated the value of the jewelry that was stolen at \$1,200. RP 152. This estimate was based in part on what she remembered paying for the jewelry at the time of purchase, between five and 23 years prior to trial, and also based on the specifics of the jewelry pieces. RP 152. For example, several pieces had diamonds in them, and the wedding bands were made of solid 14-carat gold. RP 156. The State

also introduced photographs of the jewelry that was stolen. RP 144-49; Ex. 10, 11, 12, 13.

Kyong Cha Powell and her husband, Scott, lived at 3120 NE 165th Place in Vancouver, Washington. RP 179. On June 9, 2012, her home was burglarized. RP 179. Mrs. Powell made a police report immediately. RP 180. Many things were stolen during the burglary including her wedding ring, and a lot of jewelry from Korea, a Wii game, CDs, a camera, a watch, etc. RP 181. A Seiko watch, a pig charm for a necklace, earrings, and a pearl necklace that were stolen from their home were returned to the Powells by police. RP 181-82. The State admitted photographs of the jewelry belonging to Ms. Powell. RP 182; Ex. 23. Mr. Powell estimated the value of the jewelry items to be approximately \$830, based on amount paid, and current value of gold by weight. RP 189-95.

Erik Dunham is a deputy sheriff with the Clark County Sheriff's Office. RP 196. In that capacity he responded to a report of a burglary at the Powell residence on June 9, 2012. RP 189-200. During that investigation, Deputy Dunham took an inventory of all the stolen items from Mrs. Powell and returned some items after they had been recovered. RP 201. Exhibit 23 depicts several jewelry items that Deputy Dunham returned to Mrs. Powell. RP 201.

Deputy Dunham spoke with Zalozh about the stolen property belonging to the Powells. RP 204. Zalozh candidly told Deputy Dunham that he would get property from a friend and sell it and keep a portion of the proceeds. RP 204. Zalozh told Deputy Dunham that he was guilty of possession of stolen property.

At the time of trial Richard Butler was a retired deputy sheriff from the Clark County Sheriff's Office. RP 209. On June 2, 2012, Deputy Butler was working patrol as a deputy sheriff and he responded to a call of a burglary at the Mowerys' house. RP 209. Deputy Butler observed that the Mowerys' home had been ransacked: drawers were pulled out and dumped in many rooms, cupboard doors were open and contents dumped on the floor, the sliding glass door at the back of the house had been displaced. RP 210.

During his investigation Deputy Butler contacted Mr. Norton and obtained the video surveillance from outside of Mr. Norton's home that showed two subjects walking towards the Mowery home, and then the same two subjects walking away from the Mowery home with backpacks that appeared to be full of items. RP 211-12. When Deputy Butler spoke to Zalozh about the Mowery home burglary, Zalozh denied ever having been in that neighborhood and said he didn't know anyone who lived there. RP 213.

Robin Yakhour is a deputy sheriff with the Clark County Sheriff's Office. RP 214. In 2012 she saw an increase in burglaries and thefts in the County, and she attributed this to the increase in the price of gold. RP 216. On June 11, 2012, Deputy Yakhour came into contact with Zallozh. RP 217. She found him in the backseat of a vehicle; he had two black backpacks and a plastic bag, all with items inside, with him in the backseat. RP 217. Deputy Yakhour also found jewelry items hidden under a floor mat in the vehicle within Zallozh's reach. RP 217. In the bags, the majority of the items were women's jewelry, coins, and notably a pair of gloves. RP 218. Exhibit 3 is a photograph that depicts some of the jewelry items and coins found in Zallozh's possession on June 11, 2012. RP 218. Exhibits 2 and 8 depict Mr. Mowery's backpack that was found in Zallozh's possession; Exhibit 3 depicts other items found in Zallozh's possession. RP 219-21. Exhibit 10 is also a photograph that depicts some jewelry items belonging to the Lucacis that were found in Zallozh's possession by Deputy Yakhour. RP 223. Exhibits 11, 12, and 13 are photographs depicting Mr. Lucaci's coin collection that was found in Zallozh's possession by Deputy Yakhour. RP 224.

The State also presented evidence at trial that Zallozh appeared in Clark County Superior Court on April 16, 2015 and was ordered to reappear in court by the judge on June 2, 2015, July 9, 2015, and July 13,

2015. RP 257-59. The court signed an order setting those dates as return dates for Zalozh, Zallozh signed the order, and Zallozh was given a copy of the order in court on April 16, 2015. RP 259-60. The order stated that the court dates were mandatory and that failure to appear may result in issuance of a warrant and may constitute the crime of bail jumping. RP 259-60. Zallozh did not appear for court on June 2, 2015. RP 267-69.

The trial court instructed the jury on accomplice liability in instruction 13. CP 119. The instruction stated:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she aids another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 119. The trial court instructed the jury that to convict Zallozh of residential burglary it must find that

...each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 2, 2012, the defendant entered or remained unlawfully in the dwelling of John Mowery;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
- (3) That this act occurred in the state of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 121.

The jury convicted Zalozh of all counts and the trial court imposed a standard range sentence. RP 410-12; CP 172.

ARGUMENT

I. Sufficient evidence was presented to support Zalozh's convictions.

Zalozh argues the State presented insufficient evidence to support his conviction for residential burglary by accomplice liability and insufficient evidence to support his conviction for theft of a firearm. The State presented sufficient evidence of both crimes, and Zalozh's argument fails.

In reviewing a claim of insufficient evidence, this Court considers the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficient evidence admits the truth of the State's evidence. *State v. Pacheco*, 70 Wn.App. 27, 38-39, 851 P.2d 734 (1993), *rev'd on other grounds*, 125 Wn.2d 150, 882 P.2d 183 (1994). All reasonable inferences from the evidence must be drawn in favor of the State. *Salinas*, 119 Wn.2d at 201. This Court also defers to the jury's resolution of conflicting testimony, evaluation of the credibility of witnesses, and its view on the persuasiveness of the evidence. *State v. Lubers*, 81 Wn.App. 614, 619, 915 P.2d 1157 (1996). This Court should affirm the convictions if any rational trier of fact could have found the essential elements of the crime. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence is as probative and reliable as direct evidence, and the State may rely upon both in presenting its case. *State v. Kroll*, 87 Wn.2d 829, 842, 558 P.2d 173 (1976); *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880 (1991); *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977).

A person commits residential burglary if he or she unlawfully enters a residence with intent to commit a crime against a person or property therein. RCW 9A.52.025(1). A person is guilty of theft of a firearm if "he or she commits theft of any firearm." RCW 9A.56.300(1). A

person is equally liable for actions committed by another when he acts as an accomplice as he is for actions he commits himself. *State v. Rodriguez*, 78 Wn.App. 769, 772-73, 898 P.2d 871 (1995). A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests another person to commit the crime, or aids or agrees to aid another person in planning or committing the crime. RCW 9A.08.020. Accomplice liability is predicated upon a person giving aid to another during the commission of a crime; mere presence at a crime scene is not sufficient to prove complicity, the accomplice must have been ready to assist in the commission of the crime. *State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993).

Accomplice liability is not an element of any crime, nor is it an alternative means of committing a crime. *State v. Teal*, 152 Wn.2d 333, 338, 96 P.3d 974 (2004); *State v. Carothers*, 84 Wn.2d 256, 261, 525 P.2d 731 (1974). A jury need not be unanimous as to whether a defendant committed a crime as the principal or as the accomplice “so long as ‘it was convinced that the alleged crimes were committed and that the [defendant] participated in each of them.’” *Teal*, 152 Wn.2d at 339 (quoting *Carothers*, 84 Wn.2d at 261).

Any rational trier of fact could have found based on the circumstantial evidence presented at trial that Zallozh acted as an accomplice or a principal in committing the residential burglary of the Mowery's home and the thefts of firearms. The evidence showed there were two young men, strangers to the neighborhood, seen walking in the Mowerys' neighborhood on the day and near the time when the burglary occurred. It is unusual to see much foot traffic in this neighborhood, especially from people who do not live there. The evidence also showed that a surveillance video taken at the time of the burglary showed two men first approach the area, walking towards the Mowerys' home, and then almost 20 minutes later, walking fast in the direction away from the Mowerys' residence, carrying heavy-looking backpacks that had items in them. Two eyewitnesses, Ms. Kagramanova and Ms. Chuklanov saw two young men first walk down the cul-de-sac towards the Mowerys' home, and then come back in the other direction, carrying backpacks. Ms. Kagramanova recognized Zallozh (as she knows his family and had seen pictures of him) as one of the persons she saw in the neighborhood at the time of the burglary of the Mowery residence, and identified him at trial. Ms. Chuklanov, who has lived in the neighborhood for 15 years, did not recognize these two men as anyone who lives in the neighborhood. When Zallozh was arrested, nine days later, he was in possession of Mr.

Mowery's backpack, an item that was taken from the Mowerys' house during the burglary. Zalozh also admitted to selling stolen items and said he was guilty of possession of stolen property. This evidence clearly supports a finding that Zalozh committed the burglary and theft, either as a principal or as an accomplice. At a minimum, the video evidence showed him fleeing with his co-participant, carrying a bag that appeared heavy and full of items, and being found with the stolen backpack in his possession nine days later. Fleeing and helping his co-participant carry stolen items away from a residence constitutes aiding another in the commission of a crime. There was clearly sufficient evidence from which the jury could have found, and did find, Zalozh guilty of residential burglary. The evidence was sufficient to support Zalozh's conviction; the trial court should be affirmed.

Zalozh also contests the sufficiency of his conviction for theft of a firearm because the guns were not recovered and the only proof the guns even existed was testimony from the owner and victim of the burglary and theft. However, Mr. Mowery's testimony constitutes sufficient evidence of the existence of the guns and their theft at the time of the burglary. In *State v. Tasker*, 193 Wn.App. 575, 373 P.3d 310 (2016) this Court found that an assault victim's testimony that the defendant pointed a real gun at her and that she heard clicking noises, was sufficient to establish the gun existed

and met the definition of “firearm” despite no gun having ever been recovered. *Tasker*, 193 Wn.App. at 595. There, the only testimony that the gun even existed was the victim’s description, and she was someone without a familiarity of guns aside from what she had seen on TV and in movies. *Id.* The evidence in Zallozh’s case is much stronger than in *Tasker*.

At the trial in Zallozh’s case, Mr. Mowery testified he left for a short while with his wife and came home to find his house had been burglarized. RP 112-15. The house had been ransacked and many things had been stolen, including two firearms. RP 115. Mr. Mowery testified to a familiarity with guns, and indicated that the two firearms that had been stolen were a Sig Sauer p229r-dak .40 caliber handgun and a Torse .38 special ultralight. RP 117, 22. Both firearms were functioning; Mr. Mowery shoots both of the guns regularly, maintains them and knows they worked and were currently loaded. RP 122-23. The guns were not returned or recovered. RP 123. The State presented more than sufficient evidence at trial to show Mr. Mowery owned firearms that were stolen in the burglary of his home, and that those weapons were true firearms that were functioning at the time of the theft. As established above, there was sufficient evidence that Zallozh either committed or was an accomplice to the residential burglary of the Mowery home at the time the guns were stolen. Zallozh’s claim of insufficient evidence to support the theft of a

firearm convictions due to lack of evidence that the firearm even existed is without merit. If the jury believed Mr. Mowery, which it clearly did based on its verdicts, then it was convinced beyond a reasonable doubt as to the existence of the firearms and their theft. Zallozh's claim fails.

II. There was sufficient evidence to support Zallozh's conviction for Possession of Stolen Property in the Second Degree.

Zallozh argues there was insufficient evidence to support his conviction for possession of stolen property in the second degree because there was unreliable evidence that the value of the stolen property exceeded \$750. The State presented sufficient evidence of the value of the stolen property; Zallozh's claim fails.

A person commits the crime of possession of stolen property in the second degree when he or she knowingly possesses stolen property valued in excess of \$750. RCW 9A.56.160. "Value" means the market value of the property at the time and in the approximate area of the theft. RCW 9A.56.010(21). Market value is the price that a well-informed buyer would pay a well-informed seller. *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000) (quoting *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995)). Evidence of retail price may be sufficient to establish value. *Longshore*, 142 Wn.2d at 430. Evidence of the price someone paid

for the item is entitled to great weight, though it must not be too remote in time. *State v. Hermann*, 138 Wn.App. 596, 602, 158 P.3d 96 (2007); *State v. Melrose*, 2 Wn.App. 824, 831, 470 P.2d 552 (1970). The jury is permitted to draw reasonable inferences from the evidence to determine the value of the property in question, and the State does not need to prove value by direct evidence. *Hermann*, 138 Wn.App. at 602; *Melrose*, 2 Wn.App. at 831.

In *Melrose*, the Court found the evidence sufficient to establish market value when the State presented evidence of the price paid for a camera five years prior, combined with consideration of the camera itself. *Melrose*, 2 Wn.App. at 830-32. The jury was able to consider the camera and allow for changes in condition that would have affected the market value. *Id.* at 831. The jury was entitled to use “the judgment of persons of ordinary experience and knowledge” in determining the value of the property involved. *Id.* at 832 Further in *State v. McPhee*, 156 Wn.App. 44, 230 P.3d 284, *rev. denied*, 169 Wn.2d 1028 (2010), this Court relied on the trade value of stolen property and the jury’s judgment in finding sufficient evidence of the value to affirm a conviction. There, the owner of stolen binoculars and tusks testified he had traded two salmon charter license permits, each valued at \$750, for the binoculars. *McPhee* 156 Wn.App. at 65-66.

At Zalozh's trial, the State presented evidence that the Lucacis had some jewelry stolen, including a pendent, their wedding rings, and diamond rings, as well as some coins. RP 151. Mrs. Lucaci estimated the value of the jewelry at \$1,200, based in part on what she remembered paying for the jewelry when she bought it, some of it five to ten years ago, while the wedding bands were purchased at least 23 years prior. RP 152. Ms. Lucaci also testified that the wedding bands were made of solid 14-carat gold, and several of the items had diamonds in them. RP 156. The State also introduced photographs of the jewelry stolen. RP 144-49; Ex. 10, 11, 12, 13. Mr. Lucaci testified that the stolen property included 50 to 80 one dollar coins and an Alaskan mint coin worth \$60. RP 148. Regarding the stolen property belonging to Ms. Powell, the State presented testimony from Ms. Powell that she had a Seiko watch, a pig charm for a necklace, earrings, and a pearl necklace that were stolen from her, and then returned by police. RP 181-82. The State admitted photographs of the jewelry belonging to Ms. Powell. RP 182; Ex. 23. Mr. Powell estimated the value of the jewelry items to be approximately \$830, based on amount paid, and the current value of gold by weight. RP 189-95.

In addition to the evidence of the retail price of some of the items stolen, the jury saw photographs of the Lucacis' and Powells' jewelry and

it could infer their current value from those photographs. Under *McPhee supra* and *Melrose, supra*, there was sufficient evidence to support the jury's finding that the stolen property was valued at more than \$750 in each count. Zallozh's claim fails and his convictions should be affirmed.

III. This Court should not review Zallozh's claim of erroneous admission of evidence as Zallozh failed to preserve the alleged error for appeal.

Zallozh claims the trial court erred in admitted evidence pursuant to ER 404(b). However, Zallozh has not preserved any potential error pursuant to ER 404(b) as he only objected on relevance grounds. Furthermore, the evidence did not constitute prior bad act evidence and thus ER 404(b) was not implicated. Zallozh's claim fails.

On appeal, a party may not raise an objection that was not properly preserved at trial absent a showing of manifest constitutional error. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007); RAP 2.5(a)(3). A defendant's failure to object to potential error "robs the court of the opportunity to correct the error and avoid a retrial." *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009) (citing *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). "We will not reverse the trial court's decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on

appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial.” *Id.* at 82 (citing *State v. Korum*, 157 Wn.2d 614, 648, 141 P.3d 13 (2006); *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983); *State v. Koepke*, 47 Wn.App. 897, 911, 738 P.2d 295 (1987)). In fact, it is well-settled that a defendant cannot assign error to the admission of evidence on a different ground from his objection below. *Koepke*, 47 Wn.App. at 911 (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)).

Zalozh’s case is nearly identical to the situation considered by the Supreme Court in *Korum*, *supra*. There, the trial court admitted evidence to which the defendant had objected on the basis of foundation. *Korum*, 157 Wn.2d at 648. On appeal, the defendant alleged error in the admission of this evidence under ER 403. *Id.* The Supreme Court in *Korum* found this error was not preserved for appeal because the defendant had only objected on the basis of a lack of foundation at trial, and not pursuant to ER 403.

Here, Zalozh’s only argument at trial regarding the evidence he now complains of was one of relevance. The trial court specifically confirmed his objection was one of relevance. RP 200. Now on appeal, Zalozh challenges the propriety of the admission of this evidence pursuant to ER 404(b). Zalozh did not challenge this evidence on this basis at the

trial court level and thus it is not reviewable unless this Court determines that the admission of the evidence constitutes a manifest constitutional error. Evidentiary errors, such as the erroneous admission of ER 404(b) evidence, are not of constitutional magnitude. *State v.*

Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). As Zallozh's claim concerns the alleged improper admission of ER 404(b) evidence, the alleged error is not of constitutional magnitude and may not be reviewed for the first time on appeal. *See Powell*, 166 Wn.2d at 84.

Zallozh has failed to preserve his claim that the trial court improperly admitted evidence pursuant to ER 404(b) and this Court should not review it. Zallozh deprived the trial court of the opportunity to correctly identify and ameliorate a potential issue, and Zallozh should not be allowed to sit back and allow error to occur and then profit from it on appeal. Zallozh's claim of erroneous admission of evidence is unpreserved. The trial court should be affirmed.

////

////

////

////

////

////

CONCLUSION

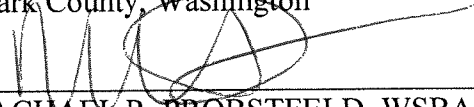
Zalozh's claims of error are without merit. The trial court should be affirmed in all respects.

DATED this 26th day of October 2016.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID #91127

CLARK COUNTY PROSECUTOR

October 26, 2016 - 4:01 PM

Transmittal Letter

Document Uploaded: 7-486121-Respondent's Brief.pdf

Case Name: State v. Pavel Zalozh

Court of Appeals Case Number: 48612-1

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jennifer M Casey - Email: jennifer.casey@clark.wa.gov

A copy of this document has been emailed to the following addresses:

penoyarlawyer@gmail.com